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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-54 ~~1092~~

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, AND GULF STEVEDORE CORP.,

Petitioners,

versus

BILL LAW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No.

VICTORY CARRIERS, INC., S. S. SAGAMORE HILL, and GULF STEVEDORE CORP.,

Petitioners,

versus

BILL LAW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Victory Carriers, Inc., S. S. SAGAMORE HILL, and Gulf Stevedore Corp., pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, reversing a decree rendered by the United States District Court for the Southern District of Alabama in Petitioners' favor.

I.

OPINIONS BELOW

A. This is a Petition to the United States Court of Appeals for the Fifth Circuit and specifically to its opinion dated September 16, 1970. This opinion has not yet been reported and is set out in full in Appendix A hereto.

B. The opinion of the District Court, dated July 15, 1969, is reported at 1970 A.M.C. 397 and is set out in full in Appendix B hereto.

II.

JURISDICTION

A. The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 16, 1970, and is printed in Appendix C hereto. On September 24, 1970, Petitioners filed timely motion for enlargement of time within which to petition for rehearing and on September 24, 1970, the Court of Appeals granted an enlargement of time to October 14, 1970, to file said petition for rehearing; on October 13, 1970, Petitioners filed in the Court of Appeals a petition for rehearing *en banc*, and alternatively, for rehearing. By order dated November 3, 1970, the Court of Appeals denied said petition, a copy of said order is appended hereto as Appendix D.

B. On November 9, 1970, Petitioners filed an application with the Court of Appeals for a stay of the mandate within which to make application to this Honorable Court for a writ of certiorari, and on November 17, 1970, the Court of Appeals granted a stay of the mandate to December 17, 1970; the clerk of the Court of Appeals letter advising of the stay of mandate is printed in Appendix E hereto.

C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

III.

QUESTION PRESENTED

The Respondent herein, Bill Law, was a fork lift machine operator who was working exclusively on the dock moving cargo from a point of dockside storage to a point on the dock from which it was subsequently loaded onto the vessel S. S. SAGAMORE HILL. He was injured while working on the dock when the overhead, or "headache" rack, of the lift machine fell on him through no fault of the vessel.

The question presented for review on this Petition is:

Does the warranty of seaworthiness owed by a vessel extend to the operator of a fork lift machine who is operating the machine exclusively upon the dock moving cargo from its position of dockside storage to a point on the dock from which it is subsequently loaded onto the vessel and who is injured by reason of some fault in the lift machine and not by the vessel or its equipment?

IV.

STATUTES INVOLVED

The statute involved is 62 Stat. 496, 46 U.S.C. § 740, Extension of Admiralty Jurisdiction Act. This statute is printed in Appendix F hereto.

V.

STATEMENT OF THE CASE

The basis of federal jurisdiction in the Court of first instance, the United States District Court for the Southern District of Alabama, is that this is a case of admiralty and maritime jurisdiction under 28 U.S.C. § 1333 (1).

On December 11, 1967, the Respondent, Bill Law, was employed by the Petitioner Gulf Stevedore Corporation (hereinafter referred to as "Gulf") as a fork lift machine operator to move aircraft landing mats from their position of storage on the dock to a position on the dock near the Petitioner vessel S. S. SAGAMORE HILL, a distance of some fifty (50) feet. The landing mats were not loaded directly onto the vessel from the fork lift machine being operated by Respondent; he would set them down on the dock, and the mats would subsequently be loaded onto the vessel by other longshoremen by use of the vessel's gear and equipment. The fork lift machine did not at any time go on board the vessel, but remained exclusively upon the dock.

While the Respondent was transporting a bundle of mats from the dock storage area to the loading point, the overhead protection rack (commonly referred to as a "headache rack") of the lift machine came loose, fell and struck the Respondent. None of the vessel's gear and equipment were in any way involved with the loosening of the rack and the resulting accident.

Law subsequently filed a complaint in the United States District Court for the Southern District of Alabama against the Respondent Victory Carriers, Inc. (hereinafter referred to as "Victory"), as owner of the S.S. SAGAMORE HILL, alleging that his injuries were caused by the unseaworthiness of the vessel and the negligence of Victory. Victory answered Law's complaint and filed a third-party action against Gulf seeking indemnification from it.

Gulf then took the discovery deposition of Respondent Bill Law and subsequently moved for summary judgment on the principal ground that the warranty of seaworthiness did not extend to Respondent or to the fork lift machine which he was operating on the dock. Subsequently, Victory moved for a summary judgment in its favor on the same grounds, and Law filed a cross-motion for a summary judgment in his favor. On July 15, 1969, the District Court entered its order granting Gulf and Victory's motions for summary judgment and denying the cross-motion of Law.

In its opinion the District Court held that Bill Law "was not engaged in work for the service of the ship and is not covered by the warranty of seaworthiness." The District Court further held that: "The Plaintiff was not engaged in the *actual* loading of the vessel at the time of the accident. It is easy to say that he was assisting or contributing in the loading of cargo aboard the vessel. But the same rationale can apply to innumerable persons who perform work which is necessary or required to 'service' the ship for sea duty."

The Court of Appeals reversed the District Court and held that the fork lift machine being operated exclusively upon the dock to move cargo from a position of storage to a point on the dock from which it was subsequently loaded onto a vessel was in effect an appurtenance of the vessel to which the seaworthiness warranty extended. In support of said holding the Appellate Court cited its own decision of *Deffes vs. Federal Barge Lines, Inc.*, (5 Cir., 1966) 361 F. 2d 422, cert. denied, 385 U.S. 969. The Court of Appeals further held that Law was engaged in loading the vessel and entitled to the warranty of seaworthiness and relied on this Court's decisions of *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; and *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, 83 S. Ct. 1863, 10 L. Ed. 2d 1082.

VI.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit herein conflicts in principle with this Court's recent decision of *Nacirema Operating Company vs. Johnson*, 1969, 396 U.S. 212, 24 L.Ed.2d 371, 90 S. Ct. 347, extends the doctrine of the warranty of seaworthiness beyond the limits dictated by the decisions of this Court, and is in direct conflict with the decisions of other federal courts of appeal and district courts.

1. The undisputed facts of the instant case are that Respondent Bill Law was operating a fork lift machine exclusively on the dock moving cargo from its position

of dock storage to a point on the dock from which it was subsequently loaded onto the vessel. At no time did the Respondent, or the fork lift machine which he was operating, go aboard the vessel nor was cargo loaded directly from the lift machine to the vessel; none of the vessel's gear, equipment or appurtenances was in any way involved with the accident. The Court of Appeals concluded that under these facts the Respondent, although injured on the pier while operating shore-based equipment, was engaged in loading the vessel and entitled to the warranty of seaworthiness. The court below gave no consideration to the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 USC § 740, or to the clear language of this Court regarding the applicability of this Act in *Nacirema Operating Company vs. Johnson*, 1969, 396 U.S. 212, 24 L.Ed.2d 371, 90 S. Ct. 347.

In *Nacirema*, a case admittedly concerned with the issue of whether a longshoreman injured on the pier was entitled to benefits under the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, 33 USC §§ 901-950, this Court discussed at some length the Extension of Admiralty Jurisdiction Act. Therein portions of the Act are quoted and commented upon by the Court as follows:

> "'The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'

> By its very choice of language, the Act reenforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clean understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule but nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters." 24 L.Ed.2d at 379.

Further, this Court stated with regard to the Extension Act as follows:

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. *But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act.*" 24 L.Ed.2d at 380. (Emphasis added.)

Circuit Judge Wright in his dissenting opinion in *Gebhard vs. S.S. HAWAIIAN LEGISLATOR*, (9 Cir., 1970) 425 F. 2d 1303, at 1313 commented on the foregoing language from *Nacirema* as follows:

"Justice White's observation could not have been casual or unintended. For the court below, whose judgment the Supreme Court reversed, had as an alternate ground of decision relied on the Extension Act to expand coverage under the Longshoremen's Act. Marine Stevedoring Corp. v. Oosting, 398 F. 2d 900, 906 (4th Cir. 1968). Judge Sobeloff suggested that the alternative to so construing the Longshoremen's Act was the toleration of a series of 'harsh and incongruous' differences in treatment of similarly-situated harbor workers. Id. at 907. The point of Justice White's remark, then, was that even were the Longshoremen's Act construed as incorporating the Extension Act, the incongruities feared by the Fourth Circuit would not be lessened. Uniform treatment of longshoremen's injuries could not be achieved, since *even under the Extension Act injuries on a pier resulting from pier-based equipment are not cognizable in admiralty* — even though they occur in connection with the loading or unloading of a ship. Justice White's construction of the Extension Act was thus central to his rejection of the reasoning below.

I should have thought the Supreme Court's construction of the Extension Act sufficient to dispose of plaintiff's unseaworthiness claim. For it is conceded that the injury here occurred 'on a pier.' And the only equipment alleged to be not reasonably fit for its intended use is 'pier-based' — namely, the straddle carriers."

This Court has unquestionably recognized that the Extension Act may permit an otherwise unavailable action in admiralty, *Gutierrez vs. Waterman S.S. Corp.*, 1963, 373 U.S. 206, 10 L.Ed. 2d 297, 83 S.Ct. 1185; however, it must be remembered that *Gutierrez* involved an injury caused by defective cargo containers which had been discharged onto the pier from a vessel on navigable waters. Here, Respondent's injury was caused "on a pier by pier-based equipment", and under the holding of *Nacirema*, is outside the Extension Act.

The Appellate Court has, by its opinion here for review, judicially extended the seaworthiness warranty beyond the intent and language of the Extension Act, and said opinion is in conflict with this Court's decision of *Nacirema Operating Company vs. Johnson.*

2. Relying on the decisions of this Court in *Seas Shipping Co. vs. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and *Gutierrez vs. Waterman Steamship Corp.*, 1963, 374 U.S. 858, 84 S.Ct. 1863, 10 L.Ed.2d 1082, the court below has extended the doctrine of the warranty of seaworthiness beyond the limits which have been established by this Court in those cases.

In *Seas Shipping Co. vs. Sieracki*, supra, this Court held that the seaworthiness warranty extended to longshoremen injured on board a vessel while engaged in ship's work. Later, in *Pope & Talbot vs. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143, this Court extended the warranty to all shore-based workers engaged in the ship's service on board the vessel; in *Alaska S.S. Co. vs. Petterson*, 1954, 347 U.S. 396, 74

S.Ct. 601, 98 L.Ed. 798, the doctrine was held to include stevedore furnished equipment for use in the ship's service as well as the vessel's own equipment. In *Gutierrez vs. Waterman Steamship Corp.*, supra, this Court held that a longshoreman who was injured on the dock when he slipped on beans which came from torn and defective bags which had been discharged from the vessel would recover from the vessel for unseaworthiness of the defective cargo. In *Gutierrez* this Court held that "the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier." (373 U.S. at 215) However, the Court left unanswered the question of whether the duty extended to those individuals who were injured while working exclusively upon the pier moving cargo for subsequent loading onto the vessel and utilizing equipment completely disconnected from the vessel. The holding of *Gutierrez* is understandable in that the injury was caused by defective cargo which had been discharged from the vessel; here, the injury was caused by an allegedly defective shore-based fork lift machine[1] while the operator was moving cargo on the dock for subsequent loading onto the vessel. It is significant that the cargo had never been aboard the vessel; the lift machine did not go aboard the vessel; the Respondent never boarded the vessel; and the vessel's gear, equipment and appurtenances were not in any way responsible for the accident.

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[1]The District Court did not reach any decision on the question of any defect in the fork lift machine and stated a determination of this question was immaterial to the issue presented.

Clearly, the Appellate Court has extended the seaworthiness doctrine beyond the limitations established by the decisions of this Court. Under the rationale of the Court of Appeals' opinion, a vessel still at sea will owe its warranty of seaworthiness to those workers on the shore who move cargo to the dockside in anticipation of her arrival. By the same token, if cargo has been discharged from the vessel to the dock and the vessel departed from the port, a fork lift driver who may be injured by a defective lift machine, not by defective cargo, may hold the vessel responsible. Under the decision here sought to be reviewed, the vessel takes a secondary, passive role in the shore-based injury; the vessel's presence is apparently immaterial as the test now becomes, according to the Appellate Court, whether the injured worker was in some manner engaged in the handling of the cargo ultimately destined for loading onto a vessel. It is submitted this is neither the intent nor the rule of *Gutierrez*.

The Appellate Court has by its opinion extended the warranty of seaworthiness owed by a vessel far beyond the intent of *Gutierrez* which will have the effect of creating unlimited litigation against a vessel for occurrences over which the vessel has absolutely no control, unless this Court clarifies the limits to which the vessel's warranty extends.

3. The decision of the court below conflicts with the decisions of the Third and Ninth Circuit Courts of Appeals decisions of *Daniel vs. Skibs A/S Hilda Knudsen*, (3 Cir., 1966) 368 F.2d 178, affirming 253 F.Supp. 758 (E.D. Pa., 1966) and *Partenweederei, MS Belgrano*

vs. Weigel, (9 Cir., 1962) 299 F.2d 897, and with the district court decision of *Drumgold vs. Plovba and Hyter vs. D. B. Deniz Naklihati T.A.S.*, (E.D. Va., 1966) 260 F.Supp. 983 (two cases); the decision further conflicts with the lower court's own case of *Kent vs. Shell Oil Company*, (5 Cir., 1961) 286 F.2d 746.

In the *Daniel* case the court declined to extend the seaworthiness doctrine to a longshoreman who was injured in a warehouse when a pulley rope used to take cargo from a railroad flat car broke causing a block to strike and injure the plaintiff. The district court in *Daniel* said:

> "While Plaintiff's work may have contributed to the unloading process in a philosophical sense, it was not unloading in the sense that it was part of the ship's work. We are aware that the recent trend of decisions in this Circuit and the Supreme Court has been to widen the ambit of seaworthiness coverage. However, there has to be an end somewhere of the unloading process in the sense of liability imposing ship's work. 'Clearly the maritime jurisdiction extended to the act of reaching into the vessel and removing cargo. Such removal, having a beginning, had to have an end.' Spann vs. Lauritzen, 344 F.2d 204, 206 (C.A. 3, 1965)." 253 F. Supp. 758, at 762.

Further in the opinion the district court said (253 F. Supp. at 762):

> "As pointed out above, the basis for the development of the warranty was to protect

against maritime hazards those persons exposed to such hazards who are unable to protect themselves from the perils involved. The plaintiff here was completely shore-based. His work was ashore and he had no contact, remote or otherwise, with the ship. There is no more need for the development of a protective shield for those in plaintiff's then occupation than there is for those engaged in any other industrial occupation. Plaintiff was subject to no particular maritime hazard, nor indeed, to any hazard that the ordinary warehouse workers would not encounter."

In *Partenweederei, MS Belgrano vs. Weigel,* supra, a plaintiff was struck by a ship's crane while operating a tractor that was pulling a loaded railroad car to the edge of the dock to get it within reach of the ship's loading gear. The Ninth Circuit Court of Appeals held the Plaintiff was not "loading" the vessel and said:

"The evidence of this case relating to the nature of libellant's work is not in dispute. The libellant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performing solely on the dock and in an operation

preliminary to, but separate from, the work of loading the lumber onto the vessel." 299 F.2d 897, at 902.

The court below has quoted at length from the case of *Drumgold vs. Plovba*, supra, (opinion, pp. 9a-14a) wherein the Virginia district court declined to extend the warranty of seaworthiness to a longshoreman (Hyter) on the dock who was struck by a fork lift machine which was moving cargo from the dock to a storage area and to a longshoreman (Drumgold) who was injured when a truck, which was using its boom to move shifting boards near the vessel for subsequent loading onto the vessel, collapsed into the water. The court held the unloading process had terminated in *Hyter's* case and that the loading process had not commenced in *Drumgold*. Although the *Drumgold* decision is set forth almost verbatim in the lower court's opinion, which is appended as Appendix A hereto, Petitioners, believing the decision to be based on sound logic and representing the views of this Court, have reproduced and appended hereto the *Drumgold* decision in its entirety as Appendix G for the ready reference of this Honorable Court.

The court below held *Drumgold vs. Plovba*, supra, represented a "minority view" which defined loading "in an exceedingly narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the vessel. (Opinion, p. 8.) The district court in this case aligned itself with the *Daniels* and *Drumgold* cases; however, the Appellate Court chose to define "loading" and "unloading" as what it referred to "in a realistic sense rather

than as hypertechnical terms of art." (Opinion, p. 20.) In so holding, the Fifth Circuit relied on *Byrd vs. American Export Isbrandtsen Lines, Inc.*, (E.D. Pa., 1969) 300 F.Supp. 1207 which held that a longshoreman injured while moving cargo on the dock for subsequent loading onto the vessel was engaged in a "loading operation." The *Byrd* decision and the Appellate Court's decision herein, as well as cases cited by the court below,[2] are in direct conflict with the *Daniel, Weigel,* and *Drumgold* decisions discussed herein.[3]

In *Kent vs. Shell Oil Company*, (5 Cir., 1961) 286 F.2d 746, a truck driver who was injured while delivering a cargo of pipe to a barge was denied the seaworthiness warranty by the court below. The court held:

> "Where the injuries are sustained wholly ashore and are caused by a thing not a part of a vessel or its appurtenances, the failure or deficiency of such facility is not deemed either to constitute unseaworthiness or give rise to any recovery under the doctrine of unseaworthiness. Fredericks vs. American Export Lines, 2 Cir., 1955, 227 F.2d 450, 454, 1956 A.M.C. 57." 286 F.2d at 752.

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[2] *Gebhard vs. S.S. HAWAIIAN LEGISLATOR*, (9 Cir., 1970) 425 F.2d 1303; *Thompson vs. Calmar Steamship Corp.*, (3 Cir.; 1964) 331 F.2d 657, cert. denied, 379 U.S. 913; *Hagans vs. Ellerman & Bucknall Steamship Co.*, (3 Cir., 1963) 318 F.2d 563; *Olvera v. Michalos*, (S.D. Tex., 1968) 307 F.Supp. 9.

[3] cf. *Young vs. Chevron Oil Company*, (E.D. La., 1970) 314 F.Supp. 1248. *DiPaola vs. International Terminal Operating Co.*, (E.D. N.Y., 1968) 294 F.Supp. 736.

Clearly, the lower court's decision herein conflicts with its own holding in *Kent vs. Shell Oil Company*, supra, as well as with the decisions of other federal courts of appeal and district courts.

4. The decision of the court below involves an important question of Federal Maritime Law which affects the entire maritime industry with regard to injuries sustained by shore-based workers on the shore as the result of shore-based equipment. Any new interpretations of maritime law or further extensions of the seaworthiness doctrine should be fashioned by this Court, and the question here presented should be settled for the guidance of lower courts and the parties whose rights are affected thereby.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28451

BILL LAW,
Plaintiff-Appellant,
versus

VICTORY CARRIERS, INC., etc.,
and the S. S. SAGAMORE HILL, etc.,
Defendants-Third Party
Plaintiffs-Appellees,
versus

GULF STEVEDORE CORP.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(September 16, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

GOLDBERG, Circuit Judge: In this admiralty case

we must decide whether the post-*Gutierrez*[1] doctrine of unseaworthiness is sufficiently expansive to embrace a longshoreman moving cargo from a point on the dock toward the vessel as part of the total operation of loading the vessel. The longshoreman, plaintiff-appellant Bill Law, was injured on December 11, 1967, while working as part of a stevedore gang engaged in the loading of the SS SAGAMORE HILL. The SAGAMORE HILL, a vessel owned and operated by Victory Carriers, Inc. (Victory), was docked at the Port of Mobile, Alabama. Law's employer, Gulf Stevedore Corporation (Gulf), was in charge of the loading operation.

The record indicates that plaintiff Law had worked as a longshoreman for ten or twelve years prior to the accident. The exact situs and specific function of his work varied. On some days he drove a forklift machine on board a vessel; on some days he worked on the dock as a "hook up" man; and on some days he drove a forklift machine on the dock. On the day of his accident he was driving a forklift machine — one owned by his employer, Gulf — on the dock. He was using a forklift to carry cargo to the hook-up point on the dock alongside the vessel. The cargo consisted of bundles of metal-mesh aircraft landing mats. Law would pick up a bundle from a pile on the dock — the pile was located approximately 50 feet from the vessel — and take it to the hook-up point alongside the ship. The mats were not taken directly onto the vessel from the forklift machine. Instead, Law would set

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[1]**Gutierrez v. Waterman S. S. Corp., 1963, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082.**

them down on the dock at the hook-up point, and they would subsequently be taken aboard the vessel by other longshoremen by use of the vessel's gear and equipment.

While Law was transporting one of the bundles of mats from the pile to the hook-up point, the overhead protection rack of the forklift machine came loose and fell on him, allegedly causing the injuries of which he now complains. The overhead protection rack, commonly called the "headache rack," is a metal frame positioned above the driver's seat to protect him from falling objects. Law's investigation after the accident allegedly revealed that the four bolts which should have secured the rack were missing.

Law filed a complaint in the district court alleging that his injuries were caused by the unseaworthiness of the SAGAMORE HILL and the negligence of Victory. The shipowner subsequently filed a third-party complaint against Gulf, seeking indemnity if Victory should be held liable to Law. After discovery both Victory and Gulf filed motions for summary judgment, to which Law responded by filing a cross-motion for summary judgment.

In ruling on the motions the district court considered only one issue — whether the warranty of seaworthiness extended to plaintiff Law.[2] The court concluded that Law was not "loading" the ship, that he therefore was not engaged in the service of the ship, and hence

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[2]The court did not pass on the question of whether or not the forklift machine was in fact defective.

that he was not within the scope of the warranty of seaworthiness. Having thus concluded that the doctrine of unseaworthiness was not applicable to this case, the court granted the motions of Victory and Gulf and denied the motion of Law.

Law now appeals, contending that the court below erred in holding that he was not within the scope of the warranty of seaworthiness. Agreeing with Law's contention, we reverse and remand.

The doctrine of unseaworthiness has been correctly called "a child of twentieth-century federal jurisprudence."[3] Brought to life by Mr. Justice Brown's famous dictum in *The Osceola*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760,[4] divorced from concepts of negligence in *Mahnich v. Southern Steamship Co.*, 1944, 321 U.S. 96, 94 S.Ct. 455, 88 L.Ed. 561, and nurtured in the bosom of a largely sympathetic judiciary ever since, the doctrine has experienced unremitting growth and expansion.[5] As Judge Coleman recently wrote for this

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[3]Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. L. Rev. 819 (1963).

[4]The second of Mr. Justice Brown's four propositions in his opinion for the Court was the following: "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. at 175.

[5]We find it unnecessary for purposes of this opinion to delineate a comprehensive historical overview of the development of the doctrine of unseaworthiness. We note, however, that this task has been undertaken with admirable results by some commentators and text writers. For example, excellent historical analyses can be found in Gilmore and Black, The Law of Admiralty, Chapter VI (1957) and Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381 (1954).

court, "[t]he doctrine is a growing concept, constantly undergoing redefinition as the risks of those protected are enlarged by changing technology and ship board technique." *Dillon v. M. S. Oriental Inventor,* 5 Cir. 1970, 426 F.2d 977, 979.

Two Supreme Court decisions have particular relevance to the case at bar. The first is *Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. In *Sieracki* the Supreme Court considered the question whether "the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen," 378 U.S. at 87, "extends to longshoremen injured while doing the ship's work aboard [the ship] but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship," *id.* at 89. The Court answered this question in the affirmative, holding that a longshoreman injured on board a vessel could pursue his remedy for unseaworthiness against the shipowner as well as his remedy against his employer under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. The Court's rationale for extending the warranty of seaworthiness to longshoremen injured on board a vessel was that a worker "doing a seaman's work and incurring the seaman's hazards," *id.* at 99, should be entitled to the seaman's protections "regardless of the fact that he is employed immediately by another than the owner," *id.* at 99.

> "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. [Citing cases]. That the owner seeks to have

> it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." *Id.* at 96.

Accordingly, the Court concluded that "when a man is performing the function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights." *Id.* at 97.

The Court's subsequent decision in *Gutierrez v. Waterman Steamship Corp.*, 1963, 374 U.S. 858, 83 S.Ct. 1863, 10 L.Ed.2d 1082, further extended the applicability of the doctrine of unseaworthiness to longshoremen, for the Court in *Gutierrez* made it clear that the doctrine has relevance to injuries sustained of the vessel. The injured longshoreman in *Gutierrez* slipped on the dock on beans which had spilled out of defective bags during the unloading of a cargo of beans from the vessel. On these facts the Court concluded that the longshoreman was within the scope of the warranty of seaworthiness, holding that 'the duty to provide a seaworthy ship and gear, including cargo containers, *applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier.*" 373 U.S. at 215 (emphasis added). The rationale implicit in this holding is a logical extension of *Sieracki*: since a longshoreman loading or unloading a vessel is doing a seaman's work and incurring a seaman's hazards, he should be entitled to the seaman's protections regardless of the fact that he is a few feet landward of the water line.

Although *Sieracki* and *Gutierrez* are the major constellations by which we steer our course in the present case, we must also be aware of several other developments in the law of admiralty which bear upon the ultimate disposition of this case. First, it is well established that the shipowner's warranty of seaworthiness extends to equipment supplied by the stevedore. *Alaska Steamship Co. v. Petterson*, 1954, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798, affirming per curiam 9 Cir. 1953, 205 F.2d 478; *Rogers v. United States Lines*, 1954, 347 U.S. 984, 74 S.Ct. 849, 98 L.Ed. 1120, reversing per curiam 3 Cir. 1953, 205 F.2d 57; see *Italia Societa per Azioni di Navagazione v. Oregon Stevedoring Co.*, 1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732. In the present case, therefore, the shipowner cannot be exonerated from liability by the mere fact that the forklift machine was owned by the stevedore rather than by the shipowner. Secondly — and this second principle ameliorates the apparent harshness of the principle just discussed — a shipowner held liable to a longshoreman for unseaworthiness may bring a third-party action against the stevedore for indemnity if the longshoreman's injury was occasioned by a breach of the stevedore's warranty (to the shipowner) of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 1956 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133. It is under this theory that Victory seeks indemnity from Gulf in the present case.[6] Finally, we

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[6]One significant result of the *Ryan* indemnity doctrine in cases involving land-based injuries was noted recently by the Ninth Circuit in Gebhard v. S.S. Hawaiian Legislator, 9 Cir. 1970, 425 F.2d 1303, 1312:

> "Although the landward extension of unseaworthiness has been criticized (*e.g.*, Skibinski v. Waterman S.S.

note that this circuit has specifically rejected the arguments (1) that the doctrine of unseaworthiness applies only to equipment which is part of the traditional gear of a ship and (2) that the doctrine applies only to equpment which is attached to or touching the ship. These arguments were laid to rest in Judge Thornberry's scholarly and well-reasoned opinion in *Deffes v. Federal Barge Lines, Inc.*; 5 Cir. 1966, 361 F.2d 422, *cert. denied*, 385 U.S. 969. Thus the application of the doctrine in the present case cannot be defeated (1) by the fact that the equipment here involved — a forklift machine — is a product of modern technology or (2) by the fact that the forklift was not physically attached to or touching the ship.

With these relevant concepts furnishing a backdrop, we turn to the fundamental question before us: Was Bill Law engaged in *loading* the SAGAMORE HILL when he sustained his injuries on December 11, 1967? Our answer to this question will determine whether he was within the scope of the warranty of seaworthiness.

In assaying this question, we find in the reported

Corp. (2d Cir. 1966) 360 F.2d 539, 543 (Judge Friendly dissenting), cert. denied (1967) 387 U.S. 921, 87 S.Ct. 2027, 18 L.Ed.2d 975), the overall result has not been unfortunate. Liability is generally shifted back to the stevedoring company through indemnity suits, and that company then has an incentive to improve its loading and unloading equipment. (*See* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co. (1964) 376 U.S. 315, 324, 84 S.Ct. 748, 11 L.Ed.2d 732; Proudfoot, "'The Tar Baby': Maritime Personal Injury Indemnity Actions" (1968) 20 Stan.L.Rev. 423, 445-46.)"

cases two distinct approaches to the problem. One approach — the majority view — is to define "loading" in an exceedingly narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the vessel. Illustrative of this approach is *Drumgold v. Plovba*, E.D. Va. 1966, 260 F.Supp. 983. The opinion in *Drumgold* disposed of two separate actions, one by a longshoreman (Drumgold) who contended that he had been injured while *loading* a vessel, the other by a longshoreman (Hyter) who contended that he had been injured while *unloading* a vessel. The court rejected both contentions. To convey the full flavor of the court's opinion, we quote *in extenso* therefrom:

> "Drumgold, a longshoreman, was employed by Rogers Terminal and Shipping Corporation, a stevedore, when injured on October 21, 1965. At the time in question the stevedore was loading a cargo of grain aboard the defendant's vessel. BELA KRAJINA, at the docks of Cargill, Inc., in the City of Chesapeake pursuant to a contract between the stevedore and the shipowner. As a part of the stevedore's duty in loading the vessel and arranging for the stowage of grain, it was necessary to furnish, secure and place shifting boards in the ship's hold in order to prevent the grain from shifting while at sea. Plaintiff had been working aboard ship when he received orders from his employer (stevedore) to go ashore for the purpose of obtaining a specially rigged truck owned by the stevedore. He was instructed to load the truck with shifting boards and thereafter bring

the truck onto the pier alongside the vessel in order that the boards could be placed aboard the vessel and used in the holds. Plaintiff, following these instructions, obtained two bundles of shifting boards, loaded same on the truck by means of the special rigging, brought the truck alongside the ship on the pier, and unloaded the shifting boards onto the pier. It was intended that the vessel's crane would lift the boards from the pier to the deck of the ship. Plaintiff was thereafter directed to use the truck's boom and hoist for the purpose of moving the shifting boards closer to the side of the vessel, thereby positioning the boards under the ship's crane. There is evidence tending to establish that the stevedore knew, or should have known, of the defective condition of the truck, its boom and standing legs. Plaintiff, in attempting to put down the truck's stabilizing legs and lift the load, found the legs defective and the truck capsized, falling into the water, as a result of which plaintiff was injured. The ship's crane was later used to raise the truck out of the water. The truck was regularly used by the stevedore in connection with loading operations but, of course, was operated on the pier and never taken aboard a vessel. There is some evidence to the effect that the ship's mate declined to allow the use of the ship's crane and this fact necessitated the use of the truck, but this factor is not essential to this memorandum.

"Hyter is a longshoreman and, on September 8, 1965, was employed by Atlantic & Gulf Stevedores, Inc.; the latter having contracted with the shipowner to perform unloading operations involving a cargo of cork from defendant's vessel, SS YOZGAT, while docked at Pier B, Northside, Norfolk, Virginia. Plaintiff had the job of slinger on the dock and, while engaged as such, plaintiff was struck by an allegedly defective forklift which was owned, operated and controlled by Atlantic & Gulf Stevedores, Inc. It is generally conceded that the operation of forklift machines on the pier or dock is a necessary adjunct to completing the unloading process of any cargo taken from a ship. There were 21 men in the stevedoring gang; 13 being aboard the vessel and 8 on the dock. The bales of cork are lifted out of the hold and then lowered to the dock where the hooks are unfastened by the slingers, following which the bales are placed upon towmotors or forklifts and taken away. Hyter, the plaintiff, had unhooked the hooks on the bale of cork when a towmotor, operated by a fellow longshoreman, backed up and ran over Hyter. While the condition of the brakes on the forklift is disputed, we will assume for the purpose of argument that the brakes were defective.

"The respective plaintiffs contend that the warranty of seaworthiness must be extended to the truck in *Drumgold* and the towmotor in

Hyter. They rely upon Spann v. Lauritzen, 3 Cir., 344 F.2d 204, cert. den. 382 U.S. 938, 86 S.Ct. 386, 15 L.Ed.2d 348; Huff v. Matson Navigation Co., 9 Cir., 338 F.2d 205, cert. den. 380 U.S. 943, 85 S.Ct. 1026, 13 L.Ed.2d 963, [Deffes v. Federal Barge Lines, Inc., 5 Cir., 361 F.2d 422, cert. den. 385 U.S. 969, 87 S.Ct. 503, 504, 17 L.Ed.2d 433,] and Metzger v. SS Kirsten Torm, D.C. Md., 245 F.Supp. 227. They point also to the celebrated casts of Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, and Italia Societa etc. v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732.

* * * *

". . . They urge, and not without merit, that if the longshoreman is in any manner engaged 'in the service of the ship', the warranty of seaworthiness applies if such service is anywise connected with the contemplated loading or the contemplated removal from the pier apron of cargo already on the pier for the purpose of stowage in a warehouse or for any other transfer purpose.

"Assuming without deciding the correctness of the rulings in *Huff*, *Spann*, and *Deffes*, this Court is not of the opinion that the seaworthiness doctrine can be so extended. For example, the longshoreman may be technically in the service of the ship if he is instructed to take a truck for the purpose of going into the city

to secure a rope or wire necessary in connection with the loading or unloading operations of a particular vessel. While so engaged the brakes on the truck become defective and, at a point many miles from the vessel, the longshoreman is injured by reason of an accident. Plaintiffs argue that the truck's defective brakes would render the vessel unseaworthy. In effect, what plaintiffs wish to do is to extend to the injured longshoreman all of the benefits accruing to the injured seaman under the Jones Act. See Hopson v. Texaco, Inc., 383 U. S. 262, 86 S.Ct. 765, 15 L.Ed.2d 740.

"In *Gutierrez* the injury to the longshoreman was sustained when he slipped on loose beans spilled on the dock occasioned by the unseaworthy condition of the cargo while aboard the vessel, with a resultant spillage during unloading operations. We agree that *Gutierrez* clearly extends the seaworthiness doctrine to longshoreman 'loading or unloading' a ship, whether aboard the ship or on the pier. We do not, however, find that the loading operation in *Drumgold* had commenced — and we further find that the unloading operation in Hyter had terminated — when the respective longshoremen were injured. Manifestly the items of equipment giving rise to the injuries were never intended to be used aboard ship; they were, at best, mere conveyors to bring equipment needed to the ship's side (*Drumgold*), or to remove already unloaded cargo to another area (*Hyter*). We find no authority which would

cause us to hold that every piece of equipment and every activity leading up to or following the loading or unloading operation must be covered under the warranty of seaworthiness. We are concerned with the ship and the ship's equipment attendant to the *ship's duty to load and unload.* If such assumption is incorrect we will be constantly confronted with claims alleging unseaworthiness of a vessel because of cargo, about to be loaded aboard ship, which falls in a warehouse on the pier thereby injuring an employee of the stevedoring concern. In *Drumgold* we do not believe that the loading operation, insofar as the warranty of seaworthiness is concerned, commenced until the shifting boards were in the process of being physically moved from the stevedore's truck to the deck. In *Hyter* we feel that the unloading terminated, insofar as the warranty of seaworthiness is concerned, when the bale of cork in a seaworthy condition was properly detached by the slingers and was at rest on the pier awaiting removal to another area. It was at these points that the warranty of seaworthiness started and stopped. Such a holding does no violence to *Gutierrez, Huff, Spann, Deffes,* and *Metzger,* all relied upon by the plaintiffs. It merely places a reasonable limitation upon the extent of seaworthiness warranty." 260 F. Supp. at 984-85, 986-87, (footnotes omitted).

In the case *sub judice* the district court embraced the narrow definition of "loading." The final order entered by the court below included the following language:

> "[T]he question presented to the Court for decision is whether a longshoreman removing cargo from storage to dockside by operating a forklift machine is performing ship's work and therefore entitled to a seaworthy vessel. After careful consideration of the facts and the applicable law, the Court concludes that the plaintiff, Bill Law, was not engaged in work for the service of the ship and not covered by the warranty of seaworthiness.
>
> "The Court's conclusion is based on the 'status' of plaintiff's work and not his situs at the time of the injury. Plaintiff was positioning cargo on the dock which in turn would be loaded onto the vessel. The cargo was not directly loaded from the plaintiff's forklift nor did the plaintiff assist in the loading of the cargo into the hold of the vessel. In the simplest sense, all plaintiff was doing was bringing cargo to the dock to be loaded on the vessel. Would a truck driver who drives to the dock in his truck and unloads freight which in turn will become cargo for a vessel be entitled to a seaworthy vessel? Would his truck be an appurtenance to the ship? The Court thinks not. True, the plaintiff's association with the vessel and to the loading operation of the cargo is closer than the hypothetical presented above, but to extend the seaworthiness doctrine to

the plaintiff's work would also extend the doctrine to an unlimited number of situations for which it was never intended. The plaintiff was not engaged in the *actual* loading of the vessel at the time of the accident. It is easy to say that he was assisting or contributing in the loading of the cargo aboard the vessel. But the same rationale can apply to innumerable persons who perform work which is necessary or required to 'service' the ship for sea duty. The liability of the ship is not unlimited. A line must be drawn. As stated in *Daniel v. Skibs A/S Hilda Knudsen,* 253 F.Supp. 758, affirmed 368 F.2d 178 (3rd C.A. 1966):

> 'While plaintiff's work may have contributed to the unloading process in a philosophical sense, it was not unloading in the sense that it was a part of the ship's work. We are aware that the recent trend of decisions in this Circuit and in the Supreme Court has been to widen the ambit of seaworthiness coverage. However, there has to be an end somewhere of the unloading process in the sense of liability imposing ship's work.'

"The above statement certainly applies to the loading process as well as the unloading of the ship; just as there must be an end to the unloading, there must be a beginning for the loading operation. In the immediate case, the plaintiff was not loading cargo aboard the

> vessel in the sense of 'ship's work' and his theory of recovery against the defendant for unseaworthiness must fail."

It is thus apparent that the district court concluded that Law was not "loading" the SAGAMORE HILL because his job — moving the aircraft landing mats to the hook-up point adjacent to the vessel — entailed activities which preceded the actual physical act of lifting the cargo onto the vessel.

The more prevalent view, however, is found in cases which define the terms "loading" and "unloading" in a more pragmatic and less ritualistic sense. Illustrative of these cases is *Byrd v. American Export Isbrandtsen Lines, Inc.*, E.D. Pa. 1969, 300 F.Supp. 1207. Like the case now before us, *Byrd* involved an injury to a longshoreman engaged in moving cargo by means of a forklift machine from one point on the dock to another point nearer the vessel. The court held that the longshoreman was involved in the operation of loading the vessel at the time of his injury. We quote the court's opinion:

> "This is a motion for summary judgment filed by the defendant shipowner in this action by a longshoreman. Defendant contends that the plaintiff's deposition conclusively establishes that the plaintiff's accident could have been occasioned only by either of two possible causes and that defendant was not responsible for either cause.
>
> "Plaintiff's deposition discloses that he and Otis Givens, another longshoreman, were en-

gaged in an attempt to move from the back to the front of the pier, a forklift truck, which was intended to be loaded aboard defendant's vessel as cargo. The attempt was undertaken by backing up another forklift truck, identified as No. 947, to the prospective cargo, so that the latter could be towed forward. As plaintiff bent down between the two trucks to attach a tow rope, No. 947 backed up, catching plaintiff between the two. Plaintiff does not know where Otis Givens was at the time plaintiff was injured, but says he last observed Givens getting off No. 947 before the accident. No ship's gear was attached to No. 947, which was owned by Atlantic & Gulf Stevedores, Inc.

"Defendant asserts that even if No. 947 was backed into plaintiff by Givens or rolled into the plaintiff because of some defective condition, the defendant cannot be held liable, because the activity in which the plaintiff was then engaged on the pier was *not yet* the loading operation of the ship.

"Defendant concedes, as it must, that it is immaterial whether the accident occurred on the pier away from the ship, *if the longshoreman was actually engaged in the service of the ship*, which includes the loading operation. Gutierrez v. Waterman Steamship Corporation, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963); Hagans v. Ellerman & Bucknall Steamship Co., 318 F.2d 563 (3 Cir. 1963).

"We believe that defendant unduly delimits the term 'loading' to the actual transfer of the cargo from the front of the pier to the vessel. The backing of No. 947 to the intended cargo and the endeavor to attach the tow rope between the vehicles were concomitant and essential steps in the loading operation.

"As this Court has stated in a similar situation in which the defendant claimed that plaintiff was merely *preparing* the cargo for loading, when he was injured while placing 'chocks' under a draft of steel beams prior to their being hoisted aboard the vessel:

> 'The term loading is not a word or art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel which constituted the work of loading.' Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 812, 817-818 (E.D. Pa. 1959).

"Since we conclude that plaintiff was essentially engaged in a loading operation and was using equipment necessary for that purpose, which was at least temporarily adopted by the ship, the defendant's motion must be denied." 300 F.Supp. at 1208 (footnote omitted).

For other holdings in a similar vein, see, e.g., *Gebhard v. S. S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303; *Thompson v. Calmar Steamship Corp.*, 3 Cir. 1964, 331 F.2d 657, *cert. denied*, 379 U.S. 913; *Hagans v. Ellerman & Bucknall Steamship Co.*, 3 Cir. 1963, 318 F.2d 563; cf. *Olvera v. Michalos*, S.D. Tex. 1968, 307 F.Supp. 9.

We choose to align ourselves with the cases which define "loading" and "unloading" in a realistic sense rather than as hypertechnical terms of art. It seems to us that plaintiff Law was clearly engaged in "loading" the SAGAMORE HILL under any conventional interpretation of that term. He was part of a group of longshoremen who were engaged in the total operation of moving cargo from the dock to the vessel. Some of the longshoremen involved in the operation were on board the vessel, while others were on the dock. The efforts of both the ship-side workers and the shore-side workers were necessary to load the ship. We think it would be incongruous and capricious to deny the protection of the warranty of seaworthiness to plaintiff Law while granting it to his fellow longshoremen whose duties happened to involve activities on the vessel or the actual physical act of lifting the cargo onto the ship. To deny him the benefits of the doctrine of unseaworthiness under these circumstances would be to reject the humanitarian policy which underlies the doctrine. Law was subjected to the risks and hazards of loading the ship;[7] he should likewise receive the protections afforded those who load ships.

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[7]For an enlightening discussion of the risks incurred by longshoremen, see Note, *Risk Distribution and Seaworthiness*, 75 Yale L.J. 1174 (1966).

In so holding, of course, we decide only the case before us and do not attempt to anticipate the cases which may arise in the future. For example, we do not take the position — asserted unsuccessfully by the plaintiffs in *Drumgold v. Plovba, supra* — that a longshoreman who is instructed to drive a truck many miles inland on a mission for his employer is necessarily within the scope of the warranty of seaworthiness. If such a case is to arise in the future, it should be decided then, not now.

We do not have here an accident occurring in some urban enclave or pastoral pasture far removed from the pier. On the contrary, Law's activities had proximity to and continuity with the job at hand — the task of loading cargo aboard the SAGAMORE HILL. His specific job performance was so integrally woven into the entire loading operation that the two cannot be separated except by the erection of hypertechnical and unrealistic legal barriers. If the terms "loading" and "unloading" are to be terms associated with reality rather than mere conceptual microcosms without adjuncts beyond the ship's beam, we have no choice but to conclude that plaintiff Law was engaged in loading the SAGAMORE HILL. We therefore hold that on the facts of this case — a longshoreman, intimately involved in the process of loading a vessel, injured as he moved cargo from the back to the front of the dock — plaintiff was within the scope of the warranty of seaworthiness.

Since we have concluded that the doctrine of unseaworthiness is here applicable, plaintiff must be afforded the opportunity to prove the truth of his allega-

tions. We therefore remand the case to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BILL LAW,

Plaintiff,

versus

VICTORY CARRIERS, INC., etc., and the SS SAGAMORE HILL, etc.,

Defendants and Third-Party Plaintiffs,

CIVIL ACTION
NO. 4941-68-T

versus

GULF STEVEDORE CORP., a corporation,

Third-Party Defendant.

This matter comes before the Court on the motions and cross-motion for summary judgment filed by all parties. The defendant, Victory Carriers, Inc. and third-

party defendant, Gulf Stevedore Corporation, filed motions for summary judgment on May 8, 1969, and May 6, 1969, respectively, alleging that there is no genuine dispute as to material fact and that judgment as a matter of law should be entered in their favor.

On May 14, 1969, the plaintiff herein, filed a cross-motion summary judgment, joining the defendant and third-party defendant in alleging that there is no genuine dispute as to the facts, but that judgment should be entered for the plaintiff.

All motions were taken under submission by the Court on June 6, 1969, with leave granted to the parties to furnish the Court with written briefs.

Now after consideration thereof, the Court enters the following findings.

The material facts in this case, with the exception of the defectiveness of the forklift machine which plays no part in the Court's determination for summary judgment, are not in serious dispute. The pertinent facts are as follows.

On or about December 11, 1967, the plaintiff herein, Bill Law, was a longshoreman forklift operator working on the docks in Mobile, Alabama. On this particular date, the plaintiff was picking up landing mats with the forklift machine at a storage point approximately 50 feet away from the vessel, the SS SAGAMORE HILL. The plaintiff would pick up one landing mat and move it towards the vessel at the hook-up position on the dock. The cargo was not hooked up from the machine,

but only placed down on the dock. At a point somewhere midway between the storage pile and the hook-up position, the overhead rack on the forklift machine became loose and struck and injured the plaintiff. The plaintiff sued the defendant as the owner of the vessel alleging that the vessel and its appurtenances and gear were unseaworthy. The defendant filed a third-party complaint seeking indemnification on the part of the plaintiff's employer, if the defendant is liable to the plaintiff. In the motions for summary judgment the third-party defendant and defendant assert that the plaintiff was not engaged in the service of the ship at the time of the accident and that the warranty of seaworthiness does not extend to him. The plaintiff asserts the opposite position in support of his motion for summary judgment.

Therefore, the question presented to the Court for decision is whether a longshoreman removing cargo from storage to dockside by operating a forklift machine is performing ship's work and therefore entitled to a seaworthy vessel. After careful consideration of the facts and the applicable law, the Court concludes that the plaintiff, Bill Law, was not engaged in work for the service of the ship and is not covered by the warranty of seaworthiness.

The Court's conclusion is based on the "status" of plaintiff's work and not his situs at the time of the injury. Plaintiff was positioning cargo on the dock which in turn would be loaded onto the vessel. The cargo was not directly loaded from the plaintiff's forklift nor did the plaintiff assist in the loading of the cargo into the hold of the vessel. In the simplest

sense, all plaintiff was doing was bringing cargo to the dock to be loaded on the vessel. Would a truck driver who drives to the dock in his truck and unloads freight which in turn will become cargo for a vessel be entitled to a seaworthy vessel? Would his truck be an appurtenance to the ship? The Court thinks not. True, the plaintiff's association with the vessel and to the loading operation of the cargo is closer than the hypothetical presented above, but to extend the seaworthiness doctrine to the plaintiff's work would also extend the doctrine to an unlimited number of situations for which it was never intended. The plaintiff was not engaged in the *actual* loading of the vessel at the time of the accident. It is easy to say that he was assisting or contributing in the loading of the cargo aboard the vessel. But the same rationale can apply to innumerable persons who perform work which is necessary or required to "service" the ship for sea duty. The liability of the ship is not unlimited. A line must be drawn. As stated in *Daniel v. Skibs A/S Hilda Knudsen*, 253 F. Supp 758, affirmed 368 F.2d 178 (3rd C.A. 1966):

> "While plaintiff's work may have contributed to the unloading process in a philosophical sense, it was not unloading in the sense that it was a part of the ship's work. We are aware that the recent trend of decisions in this Circuit and in the Supreme Court has been to widen the ambit of seaworthiness coverage. However, there has to be an end somewhere of the unloading process in the sense of liability imposing ship's work."

The above statement certainly applies to the loading process as well as the unloading of the ship; just as there must be an end to the unloading, there must be a beginning for the loading operation. In the immediate case, the plaintiff was not loading cargo aboard the vessel in the sense of "ship's work" and his theory of recovery against the defendant for unseaworthiness must fail. The Court so finds.

Therefore, for good cause appearing

It is ORDERED, ADJUDGED and DECREED by the Court that the motion for summary judgment filed by the third-party defendant on May 6, 1969, should be and is hereby GRANTED.

It is further ORDERED, ADJUDGED and DECREED by the Court that the motion for summary judgment filed on May 8, 1969, by the defendant should be and is hereby GRANTED.

It is further ORDERED, ADJUDGED and DECREED by the Court that the cross-motion for summary judgment filed by plaintiff on May 14, 1969, should be and is hereby DENIED.

DONE at Mobile, Alabama, this the 15th day of July 1969.

DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
SOU. DIST. ALA.

FILED AND ENTERED THIS THE
15th DAY OF JULY,
1969, MINUTE ENTRY
NO. 25761

WILLIAM J. O.CONNOR, CLERK
BY WILLIAM J. O'CONNOR
DEPUTY CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28451

D. C. Docket No. CA 4941-68-T

BILL LAW,
Plaintiff-Appellant,

versus

VICTORY CARRIERS, INC., etc.,
and the S. S. SAGAMORE HILL, etc.,
Defendants-Third-Party
Plaintiffs-Appellees,

versus

GULF STEVEDORE CORP.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-third party plaintiffs-appellees and third-party defendant-appellee, pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 16, 1970

Issued As Mandate:

APPENDIX D

PERMANENT RECORDS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28451

BILL LAW,
Plaintiff-Appellant,
versus

VICTORY CARRIERS, INC., etc.,
and the S. S. SAGAMORE HILL, etc.,
Defendants-Third Party
Plaintiff-Appellees,
versus

GULF STEVEDORE CORP.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 16, 1970, 5 Cir., 1970, ____ F.2d ____).

(November 3, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 33 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

November 17, 1970

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

Mr. W. Boyd Reeves
Attorney at Law
P. O. Box 290
Mobile, Alabama 36601

RE: NO. 28451 - Bill of Law vs. Victory Carriers, Inc. etc. vs. Gulf Stevedore Corp.

Mandate Stayed to 12/17/70.

Dear Sir:

The Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this Court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office. 38 LW 3502.

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) G. F. GANCHEAU
G. F. Ganucheau
Chief Deputy Clerk

/ra
enc.
cc: Mr. Francis M. Thigpen
Mr. Ross Diamond, Jr.
Mr. George F. Wood

APPENDIX F

ADMIRALTY AND MARITIME JURISDICTION EXTENSION ACT

46 U.S.C. Section 740.

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496."

APPENDIX G

Richard L. DRUMGOLD, Plaintiff,

v.

Spelsna PLOVBA, Defendant.
Sam HYTER, Plaintiff,

v.

D. B. DENIZ NAKLIHATI T. A. S.,
Defendant.
Civ. A. Nos. 5298, 5307.

United States District Court
E. D. Virginia,
Norfolk Division.
Nov. 29, 1966.

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* * * *

MEMORANDUM

WALTER E. HOFFMAN, Chief Judge.

In all pertinent respects the factual situation and legal issues raised in these cases are substantially identical.

Drumgold, a longshoreman, was employed by Rogers Terminal and Shipping Corporation, a stevedore, when

injured on October 21, 1965. At the time in question the stevedore was loading a cargo of grain aboard the defendant's vessel, BELA KRAJINA, at the docks of Cargill, Inc., in the City of Chesapeake pursuant to a contract between the stevedore and the shipowner. As a part of the stevedore's duty in loading the vessel and arranging for the stowage of grain, it was necessary to furnish, secure and place shifting boards in the ship's hold in order to prevent the grain from shifting while at sea. Plaintiff had been working aboard ship when he received orders from his employer (stevedore) to go ashore for the purpose of obtaining a specially rigged truck owned by the stevedore. He was instructed to load the truck with shifting boards and thereafter bring the truck onto the pier alongside the vessel in order that the boards could be placed aboard the vessel and used in the holds. Plaintiff, following these instructions, obtained two bundles of shifting boards, loaded same on the truck by means of the special rigging, brought the truck alongside the ship on the pier, and unloaded the shifting boards onto the pier. It was intended that the vessel's crane would lift the boards from the pier to the deck of the ship. Plaintiff was thereafter directed to use the truck's boom and hoist for the purpose of moving the shifting Boards closer to the side of the vessel, thereby positioning the boards under the ship's crane. There is evidence tending to establish that the stevedore knew, or should have known, of the defective condition of the truck, its boom and standing legs. Plaintiff, in attempting to put down the truck's stabilizing legs and lift the load, found the legs defective and the truck capsized, falling into the water, as a result of which plaintiff was injured. The ship's crane was later used to raise the

truck out of the water. The truck was regularly used by the stevedore in connection with the loading operations but, of course, was operated on the pier and never taken aboard the vessel. There is some evidence to the effect that the ship's mate declined to allow the use of the ship's crane and this fact necessitated the use of the truck, but this factor is not essential to this memorandum.

Hyter is a longshoreman and, on September 8, 1965, was employed by Atlantic & Gulf Stevedores, Inc.; the latter having contracted with the shipowner to perform unloading operations involving a cargo of cork from defendant's vessel, SS YOZGAT, while docked at Pier B, Northside, Norfolk, Virginia. Plaintiff had the job of slinger on the dock and, while engaged as such, plaintiff was struck by an allegedly defective forklift which was owned, operated and controlled by Atlantic & Gulf Stevedores, Inc. It is generally conceded that the operation of forklift machines on the pier or dock is a necessary adjunct to completing the unloading process of any cargo taken from a ship. There were 21 men in the stevedoring gang; 13 being aboard the vessel and 8 on the dock. The bales of cork are lifted out of the hold and then lowered to the dock where the hooks are unfastened by the slingers, following which the bales are placed upon towmotors or forklifts and taken away. Hyter, the plaintiff, had unhooked the hooks on a bale of cork when a towmotor, operated by a fellow longshoreman, backed up and ran over Hyter. While the condition of the brakes on the forklift is disputed, we will assume for the purpose of argument that the brakes were defective.

The respective plaintiffs contend that the warranty of seaworthiness must be extended to the truck in *Drumgold* and the towmotor in *Hyter*. They rely upon Spann v. Lauritzen, 3 Cir., 344 F.2d 204, cert. den. 382 U.S. 938, 86 S.Ct. 386, 15 L.Ed.2d 348; Huff v. Matson Navigation Co., 9 Cir., 338 F.2d 205, cert. den. 380 U.S. 943, 85 S.Ct. 1026, 13 L.Ed.2d 963, and Metzger v. SS Kirsten Torm, D.C. Md., 245 F.Supp. 227. They point also to the celebrated cases of Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, and Italia Societa etc. v. Oregon Stevedoring Co., 376 U.S. 315, 84 C.St. 748, 1 L.Ed.2d 732. Especially, plaintiffs say, is the significance of footnote 3 from *Italia* where it says in part:

> "If the owner engages others who supply the equipment necessary for stevedoring operations, he must still answer to the longshoreman if the gear proves to be unseaworthy."

Taking the foregoing statement at its face value, without more, it encompasses every phase of a stevedoring operation from office management to actual loading or unloading, irrespective of the type of equipment used and without regard to the manner and place of injury. Stated otherwise, if equipment is directly or indirectly used as a necessary adjunct to a stevedoring operation as a business enterprise, then, plaintiffs argue, the warranty of seaworthiness applies.

In *Huff*, the longshoreman was injured in the hold of the ship because of a defect in a conveyor system which was attached to a gantry crane running on rails along the pier. Thus the conveyor system, while at-

tached to a shoreside piece of equipment, was actually brought aboard or into the vessel and constitutes a reasonable extension of the rule pronounced in Alaska S.S. Co. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798.

In *Spann*, the longshoreman was engaged in unloading a hopper which stood on a pier but was not attached to the vessel. A shore-based crane would lower a bucket into the hold, pick up a load of nitrate, swing it around, and drop it into a hopper on the pier. Empty trucks would move under the hopper and the plaintiff-longshoreman would then open the door of the hopper to permit the nitrate to dump into the waiting truck. The longshoreman was injured because of a defective release mechanism on the hopper, thereby causing a sudden premature downward movement of the hopper handle.

The doctrine of seaworthiness has been applied to a longshoreman injured on the dock due to the defective operation of a ship's winch in unloading operations in American Export Lines, Inc. v. Revel, 4 Cir., 266 F.2d 82, decided in 1959, prior to the decisions from Third and Ninth Circuits in *Spann* and *Huff* respectively, and several years before Gutierrez and Italia Societa.

There is a definite conflict in Circuits occasioned by other opinions from the Second and Sixth Circuits. In Forkin v. Furness Withy & Co., 2 Cir., 323 F.2d 638, Circuit Judge Friendly suggests cogent reasons why there is no warranty of seaworthiness owed to a longshoreman injured while engaged in attempting to make fast a conveyor being raised to a ship. And in McKnight

v. N. M. Paterson & Sons, Ltd., N.D.Ohio, 181 F.Supp. 434, affirmed 6 Cir., 286 F.2d 250, cert. den. 368 U.S. 913, 83 S.Ct. 189, 7 L.Ed.2d 130, a recovery was denied on summary judgment where the longshoreman, while working in the hold of the vessel, was struck by a part of the unloading gear being lowered into the ship's hold by means of a shore-based crane owned and operated by the stevedore. The *Forkin* opinion considers and distinguishes *Gutierrez*, the 1963 decision of the United States Supreme Court.

In 1955 the case of Fredericks v. American Export Lines, 2 Cir., 227 F.2d 450, cert. den. 350 U.S. 989, 76 S.Ct. 475, 100 L.Ed. 855 was decided and is, factually speaking, closest in point to the situation here presented. There the longshoreman was injured when a skid, located on a pier and used in the unloading of cargo, failed. The argument was advanced that the cargo could not be safely transferred from aboard ship to the upper story of the pier without the use of a skid. As Circuit Judge Medina said on this subject:

> "But tools or equipment do not become part of a lessee's plant merely because such tools or equipment are indispensable to the work that an independent contractor has agreed to perform. * * *
>
> "* * * (H)ere the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. No decision so far has extended the sweeping protec-

> tion of the seaworthiness doctrine to this situation. No vessel was connected with the accident."

On the subject as to whether any "vessel was connected with the accident", it should be noted that the longshoreman was engaged in assisting in the transfer of cargo from a ship to the upper story of the pier.

More recently, Deffes v. Federal Barge Lines, Inc., 5 Cir., 361 F.2d 422, cert. pending, has been added to the list approving *Huff* and *Spann*, and rejecting *McKnight* and *Forkin*.

The plaintiffs in these cases are urging a further expansion of the *Huff*, *Spann*, and *Deffes* doctrine. They urge, and not without merit, that if the longshoreman is in any manner engaged "in the service of the ship", the warranty of seaworthiness applies if such service is anywise connected with the contemplated loading or the contemplated removal from the pier apron of cargo already on the pier for the purpose of stowage in a warehouse or for any other transfer purpose.

Assuming without deciding the correctness of the rulings in *Huff*, *Spann*, and *Deffes*, this Court is not of the opinion that the seaworthiness doctrine can be so extended. For example, the longshoreman may be technically in the service of the ship if he is instructed to take a truck for the purpose of going into the city to secure a rope or wire necessary in connection with the loading or unloading operations of a particular vessel. While so engaged the brakes on the truck become defective and, at a point many miles from the vessel, the longshoreman is injured by reason of an

accident. Plaintiffs argue that the truck's defective brakes would render the vessel unseaworthy. In effect, what plaintiffs wish to do is to extend to the injured longshoreman all of the benefits accruing to the injured seaman under the Jones Act. See: Hopson v. Texaco, Inc., 383 U.S. 262, 86 S.Ct. 765, 15 L.Ed.2d 740.[1]

[1-3] In *Gutierrez* the injury to the longshoreman was sustained when he slipped on loose beans spilled on the dock occasioned by an unseaworthy condition of the cargo while aboard the vessel, with a resultant spillage during unloading operations. We agree that *Gutierrez* clearly extends the seaworthiness doctrine to longshoremen "loading or unloading" a ship, whether aboard the ship or on the pier. We do not, however, find that the loading operation in *Drumgold* had commenced — and we further find that the unloading operation in Hyter had terminated — when the respective longshoremen were injured. Manifestly, the items of equipment giving rise to the injuries were never intended to be used aboard ship; they were, at best, mere conveyors to bring equipment needed to the ship's side (*Drumgold*), or to remove already unloaded cargo to another area (*Hyter*). We find no authority which would cause us to hold that every piece of equipment and every activity leading up to or following the loading or unloading operation must be covered under the warranty of seaworthiness. We are concerned with the ship and the ship's equipment attendant to the *ship's duty to load and unload.* If such assumption is incor-

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[1] But Hopson v. Texaco, Inc., supra, does not purport to say anything with respect to the warranty of seaworthiness. The injured and deceased seamen were undoubtedly "in the service of the vessel" when involved in the taxi accident.

rect we will be constantly confronted with claims alleging unseaworthiness of a vessel because of cargo, about to be loaded aboard ship, which falls in a warehouse on the pier thereby injuring an employee of the stevedoring concern. In *Drumgold* we do not believe that the loading operation, insofar as the warranty of seaworthiness is concerned, commenced until the shifting boards were in the process of being physically moved from the stevedore's truck to the deck. In *Hyter*[2] we feel that the unloading terminated, insofar as the warranty of seaworthiness is concerned, when the bale of cork in a seaworthy condition was properly detached by the slingers and was at rest on the pier awaiting removal to another area. It was at these points that the warranty of seaworthiness started and stopped. Such a holding does no violence to *Gutierrez, Huff, Spann, Deffes* and *Metzger,* all relied upon by the plaintiffs. It merely places a reasonable limitation upon the extent of the seaworthiness warranty.

Whatever has been said herein does not constitute any expression of opinion as to negligence, if the plaintiffs determine that any such basis of recovery exists.

[2]*Hyter* was argued together with *Drumgold.* Counsel in *Hyter* were instructed to prepare a stipulation of facts which apparently has not been done. If the facts in *Hyter* are incorrectly stated, the Court should be so advised.

PROOF OF SERVICE

I, T. K. JACKSON, JR., one of the attorneys for the Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1970, I served three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Bill Law, Respondent herein, by mailing the same in a duly addressed envelope, with first class postage prepaid, to Honorable Ross Diamond, Jr., attorney for Respondent, at his office address, 610 Van Antwerp Building, Mobile Alabama.

T. K. JACKSON, JR.
Counsel for Petitioner
1101 Merchants National
Bank Building
Mobile, Alabama 36602